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JULY 30th, 1766.

ANSWERS

FOR

Robert Moir Writer in *Edinburgh*, and *John Moir* Merchant there,

TO THE

PETITION of *James Moir* Schoolmaſter in *Edinburgh*.

THE Petitioner and the Reſpondents are three Brothers, *Robert* the eldeſt, *James* the ſecond, and *John* the youngeſt.

The Petitioner, conſcious of his own Demerit, and from thence juſtly apprehenſive that the Reſpondent *Robert*, his immediate elder Brother, who is ſtill a Batchelor, may be diſpoſed to prefer the other Reſpondent, his youngeſt Brother, in the Succeſſion to his ſmall Inheritance, has bethought himſelf of this moſt ſingular Device, to prevent and diſappoint the Effect of any Diſpoſition or Deed of Settlement which *Robert* has already made, or may hereafter make, in favours of *John*, to the Prejudice of his the Petitioner's Right of Succeſſion in due Courſe of Law.

The Summons moſt falſely ſets forth, that their common Father did execute a Diſpoſition and Deed of Settlement, whereby he diſponed his Lands of *Lochfield* to *Robert* his eldeſt Son, and failing him by Deceaſe, without Heirs of his Body, to and in favours of the Petitioner, his ſecond Son, and his Heirs, and that, by ſaid Diſpoſition or Deed of Settle-

ment, *Robert* was appointed to poſſeſs ſaid Lands in virtue thereof, and to make up his Titles thereon, and that he was prohibited to alter the Order of Succeſſion thereby eſtabliſhed.

The Diſpoſition referred to is dated, 9th *July* 1734, was recorded in the Books of Seſſion 2d *March* 1745, an Extract of which is produced in Proceſs, from which it appears to be a ſimple, abſolute Diſpoſition of theſe Lands, whereby, upon a Recital that *Robert* had given Security to his Father, for relieving him of his juſt and lawful Debts, and for Payment to him and his Wife of a certain Liferent-annuity, and of the Proviſions to his younger Children, he thereby diſponed to *Robert*, his Heirs and Aſſignees whatſoever, heritably and irredeemably, his Lands of *Lochfield*, without any Limitation or Subſtitution whatſoever. And as this Diſpoſition was not only recorded in the moſt publick Regiſter, but compleated by Infeftment as far back as the 1745, and therefore could not be unknown to this Petitioner, it is ſubmitted to your Lordſhips how improper and unbecoming it was in him to ſet forth the ſame in the aforeſaid Summons, to be a Deed of ſtrict Settlement, containing a Subſtitution in his favours, and reſtraining the Reſpondent, *Robert*, from altering the Courſe of Succeſſion to his, the Petitioner's Prejudice.

And as from the Tenor of ſaid Diſpoſition, as above recited, your Lordſhips have heard, that it was granted with the Burden of the Father's Debts, ſo there is produced in Proceſs a Liſt of theſe Debts, with a Docquet thereto ſubjoined, ſigned both by the Father and Son, referring to the aforeſaid Diſpoſition, as containing a juſt Liſt of the Debts the Father then was owing, and of which *Robert* was to relieve his Father, to the Amount of 6052 *l.* 13 *s.* 4 *d. Scots*, a very heavy Burden upon ſo ſmall an Eſtate, which, *communibus annis*, does not amount to 50 *l. Sterling* of yearly Rent, and that beſides the younger Childrens Proviſions, and the Liferent-annuities reſerved to *James* the Father, and his Wife,

which

which laſt, to the Amount of 20 *l.* 8 *s.* 4 *d. Sterling per annum*, is ſtill a ſubſiſting Incumbrance.

The Summons proceeds to ſet forth, That *Robert*, from the exceſſive Uſe of ſtrong Liquors, and other Cauſes, had fallen into ſo weak a State of Mind, as to be utterly incapable to manage his Affairs, and at the ſame time ſo laviſh and prodigal of his Subſtance, that, if not prevented, he muſt in a few Years dilapidate and throw away his whole Means, and be reduced to Poverty and Want: That in this unhappy Situation, the Reſpondent, *John*, and others, by his Inſtigation, have raiſed in the Mind of *Robert* a groundleſs Averſion to the Petitioner, his next Heir, and had elicited from him Settlements, and other Deeds, whereby the Petitioner may be diſappointed of his Brother's Succeſſion: That, in this View, neglecting the Father's Settlement, they had ſerved *Robert* Heir in ſpecial to his Father, of purpoſe to put it in his Power to alter the Order of Succeſſion eſtabliſhed by his Father's Settlement: That *John* has already obtained, or is endeavouring to obtain from *Robert*, in this inſane State of Mind, Bonds, Diſpoſitions, and other Deeds, to the Prejudice of his, the Petitioner's Right of Succeſſion, notwithſtanding that *Robert* is at this Day, and has for ſome Years paſt, been in the moſt torpid and inactive State of Mind, and has not poſſeſſed a ſound and diſponing Judgment, while, at the ſame time, he is ſo facile, laviſh, and inattentive, in the Management of his Affairs, that he has already incumbered himſelf conſiderably.

From theſe Premiſſes, the Summons concludes for Exhibition of the Father's Deed of Settlement, and that *Robert* ſhould be decerned to make up his Titles upon ſaid Settlement. It alſo calls for Exhibition of all Diſpoſitions, Contracts, Bonds, Bills, and other Deeds, granted by *Robert* to *John*, or any of his Children, or to any other Perſon, for their Uſe and Behoof. And concludes, that theſe ſhould be reduced,

reduced, as elicited from *Robert* without any Value, and that *Robert* ſhould be judicially interdicted.

This Summons is a ſtrange Hotch-potch or Medley, falſe in every Particular, ſo far as relates to the Father's Settlement; and, in ſo far as reſpects *Robert*'s State and Condition, repreſenting him to be either *inſanæ mentis*, which, if true, would entitle the Petitioner, upon a Brief of Lunacy, to have him cognoſced a Lunatick, and the Petitioner ſerved Tutor-in-law to him, or ſo prodigal, facile, and weak, as to require a judicial Interdiction.

The firſt of theſe is ſo far founded in Truth, that *Robert*, as far back as the Year 1750, or thereby, was, by the Hand of Providence, afflicted with a nervous Fever, which, as uſual in Caſes of the like Nature, was for ſome little Time attended with a Degree of Diſorder in his Judgment, but from which he ſoon reconvaleſced, as thouſands have done before him, and from that Day to this, has been of as ſound Judgment as any Perſon whatever, or as he himſelf ever was at any Time in his Life.

It is at the ſame time true, that as this temporary Diſorder threw *Robert* out of Buſineſs as a Writer or Extracter, he contracted a Habit of tippling and drinking, and it may poſſibly be true, that while he continued under that Habit, and when in Liquor, he may have done ſeveral fooliſh Things; but it is equally certain and notorious, that, as by the Care and Attention of the other Reſpondent, his younger Brother, while totally neglected by the Petitioner, he ſhook off that Habit of drinking, ſo, for theſe ſeveral Years paſt, there is no Man whatever has lived a more regular and ſober Life; and even while addicted to that Habit, was ſo far from being laviſh or prodigal of his Money, that to all his Acquaintances he was remarkable for the quite oppoſite Diſpoſition, of which the preſent State of his Affairs furniſhes moſt irreſiſtible Evidence.

For,

For, as your Lordſhips have heard, that beſides the Life-rent-annuities reſerved to his Father and Mother, and Proviſions to the younger Children, the Diſpoſition to this ſmall Eſtate was burdened with his Father's Debts, to the Amount of *6052 l. 13 s. 4 d. Scots*, as contained in the aforeſaid ſigned Liſt, beſides ſundry other Debts, omitted out of that Liſt, which, in Juſtice to his Father, he thought himſelf bound to pay; and, as in his Profeſſion of a Writer or Extracter, he had extremely little Employment, your Lordſhips muſt from thence be ſenſible, what ſmall Funds *Robert* had to live upon; and therefore, if it ſhall appear to be true, and which he avers to be the Fact, that the Debts he owes at this Day are conſiderably leſs than they were when he entered into Poſſeſſion of this ſmall Eſtate, your Lordſhips' will from thence judge, with what Juſtice he is characteriſed a Prodigal or Spendthrift.

For as, when theſe Lands were diſponed to *Robert*, he gave Security to his Father for Relief and Payment of the aforeſaid Debts, having no Fund out of which to pay theſe and the other Debts omitted out of the aforeſaid Liſt, which came upon him, other than the Lands themſelves, which he did not chooſe to part with; he borrowed Money from other Hands, and paid off the Father's Debts, whereby he purified the Obligation he had come under to his Father; but as this was no Relief to himſelf, as it was only ſhifting Hands, and as the Creditors in theſe new Debts were frequently diſtreſſing him, which obliged him from Time to Time to borrow from other Hands to clear them, he at length prevailed with the other Reſpondent, his younger Brother, to advance what Sum was neceſſary to clear the moſt preſſing of his Debts, and granted him a Factory for levying the Rents of this ſmall Eſtate, in order to his applying the Proceeds of theſe in Payment of his Mother's Annui-

ty, for his own Aliment and Subſiſtence, and what Savings could be made, in Payment of ſome ſmall Debts he was ſtill owing.

Under this Factory, *John* did intromit with ſome Part o the Rents, for about two Years, but finding that to be i convenient, as his proper Buſineſs as a Merchant here i *Edinburgh* required cloſe Attendance, he gave up the Factory, and *John Forreſter* of *Killmore*, Writer in *Stirling*, w. appointed Factor in his Place, and continues ſo at th Day.

As theſe Debts were owing to many different Perſons, the could not be paid off all at once, and, therefore, *John* go Notes of hand, or other interim Securities from *Robert*, fo the Sums he had from Time to Time advanced, and when the whole of the Debts, excepting ſome Trifles, had been paid up, the two Brothers came to a Clearance, upon the 9th *January* 1762, whereby, *John* was found to be in Advance for *Robert*'s Account, in the Sum of 230 *l. Sterling*, including a Bill of 142 *l.* which *Robert* had granted to *John*, upon the 10th *December* 1761, for Advances then made, and of that Date, *Robert* granted to *John*, an heritable Bond for the above mentioned Sum of 230 *l.* This Tranſaction was made at the Sight of *Thomas Boſwall*, Writer in *Edinburgh*, who formed the heritable Bond, and that Gentleman's Character puts him above the Suſpicion of being acceſſory to any Settlement or Tranſaction of that Nature, with one that was either *inſanæ mentis*, or ſo remarkably facile and weak, as the Petitioner is now pleaſed to repreſent his Brother to be.

And here it is material to obſerve, that as the whole Articles, which compoſed the above mentioned Sum of 230 *l.* for which the heritable Bond was granted, conſiſted of *John*'s Bill for the 142 *l.* and other Debts due by *Robert*, which *John* had then paid and retired, the Vouchers are all particularly recited in the heritable Bond, which therefore ſuperſeded

ſeded the Neceſſity of inſtituting any Account at that Time, for inſtructing the Particulars of which, the heritable Bond was compoſed.

But, as *John* intromitted with Part of the Rents of theſe Lands, and applied the ſame in Payment of their Mother's Annuity, and of ſome ſmall Debts which ſtill remained due by *Robert*, and in ſmall Advances to *Robert* himſelf, they came to a Clearance, upon the 2d *April* 1765, in preſence of *Charles Guthrie*, Writer in *Edinburgh*, and *Charles Dall*, Writer to the Signet, and *John Jolly*, his Clerk. The Account, and Docquet are Holograph of *Robert* himelf, and the Clearance, was witneſſed by the three Gentlemen above named, and as a Balance was thereby aſcertained to *John* of 41 *l.* 10 *s.* *Sterling*, it occurred to theſe Gentlemen to be proper, in order to give a full *vidimus* of the whole Tranſactions between the two Brothers, that another Account ſhould at the ſame Time be made up, ſtating the particular Sums for which the former heritable Bond had been granted, this was accordingly done, and the Articles in that Account are identically the ſame with thoſe in the heritable Bond itſelf.

And as, from the Balances aſcertained upon both theſe Accounts, *Robert* was found to be juſtly addebted to his Brother *John* in the Sum of 310 *l.* *Sterling*, he, of that Date, granted his ſecond heritable Bond of Corroboration, formed by *Charles Dall*, and witneſſed by him the ſaid *Charles Dall*, *Charles Guthrie*, and *John Jolly*.

And as it thus appears, that theſe Accounts were ſettled and cleared between the two Brothers, in the moſt regular Manner, at the Sight of Gentlemen of Character and Reputation, ſo your Lordſhips perceive, that the Sum for which this ſecond heritable Bond of Corroboration was granted, is conſiderably ſhort of the Debts due by the Father, wherewith the Diſpoſition to *Robert* was burdened, not to mention the

Father

Father and Mother's reſerved Annuities, and the other Debts omitted out of ſaid Liſt, which *Robert* paid; and, ſo ſtanding the Caſe, it is ſubmitted to your Lordſhips with what Propriety, Truth, or Juſtice, *Robert* is here characteriſed a Prodigal and Spendthrift, when the Debts, with which his Diſpoſition to theſe Lands was burdened, are ſo far reduced, and that not a ſingle Act of Profuſion or Prodigality has been, or can be, condeſcended upon.

When this very ſingular Proceſs came to be inſiſted in before the Lord *Auchinleck*, Ordinary, his Lordſhip very properly required a Condeſcendence from the Petitioner, of thoſe Facts and Circumſtances from which he would infer the Concluſion, of having the Reſpondent, *Robert*, judicially interdicted. A Condeſcendence was accordingly exhibited, wherein Notice was taken of the abovementioned Diſorder wherewith *Robert* had been afflicted, as far back as the Year 1750 or 1751, and, which the Condeſcendence ſets forth, had obliged *Robert* to be confined for ſome Months, but from which, it was, at the ſame time, acknowledged, he had ſo far reconvaleſced, as to be able to do Buſineſs as an Extracter in *Durie*'s Office, and this is all that has hitherto been alledged for inferring this cruel and ſevere Imputation of Infanity.

The Condeſcendence proceeds to charge, that ſome time thereafter, *Robert* fell into a habitual Courſe of drinking Spirits, which rendered him unfit for taking care of himſelf, or doing Buſineſs for others, and that, while in this Habit, he was guilty of ſeveral fooliſh and outrageous Actions, which the Condeſcendence brings down to the Year 1760. From which Period, to this Day, it does not ſpecify one ſingle Action either of Folly or Facility. For as to the alledged Prodigality and Profuſion, there is not, from firſt to laſt, one ſingle Inſtance thereof condeſcended upon; and this juſtifies the Account given by the Reſpondent, that, however true it

may

may be, that *Robert*, while under that Habit of Drinking, may have been guilty of fooliſh Actions, yet, as he was happily reclaimed therefrom ſeveral Years ago, and, from that Period, has lived as regular and ſober a Life as any Perſon whatever can poſſibly do, ſo, at no Period of his Life was he ever guilty of one ſingle Act of Prodigality or Profuſion, on the contrary, was, to the Obſervation of all his Acquaintance, remarkably parſimonious, the very reverſe of a Prodigal, of which there needs no other Proof than the State of his Funds at this Day, compared with what they were at the Date of his Father's Diſpoſition of this ſmall Eſtate to him.

The Petitioner would indeed impreſs your Lordſhips to believe, that *Robert* had, ſeveral Years ago, paid off his Father's Debts out of the Profits and Perquiſites of his Buſineſs as a Writer, and therefore, that his latter Contractions muſt have been the Conſequence of his Facility and Prodigality; but your Lordſhips have already heard how falſe and unfair a Repreſentation this is; it was by Borrowings that *Robert* was enabled to pay off his Father's Debts, and theſe had no End till the Reſpondent *John*, out of mere Favour and Goodwill to his Brother, advanced his own Money to relieve him at the Hands of theſe his other Creditors, and for theſe Advances obtained the two heritable Bonds above mentioned.

Upon adviſing ſaid Condeſcendence and Anſwers, the Lord Ordinary, by Interlocutor of this Date, "found the Facts "condeſcended upon are not ſuch as prove Prodigality or "Laviſhneſs, which would make a Proceſs for a judicial In-"terdiction proper, and therefore diſmiſſes this Proceſs, re-"ſerving to the Purſuer to have the Defender's State of Mind "cognoſced, by a Jury upon a Brieve of Furioſity or Idio-"try, as accords;" and to which his Lordſhip adhered, by Interlocutor of this Date. Feb. 21, 1766. March 27, 1766.

The Purſuer preferred a ſecond Repreſentation, wherein he

condeſcended upon the two heritable Bonds above mentioned, (without noticing that the laſt was corroborative of the firſt) and thereby called upon the Reſpondents to exhibit an Account of all the Tranſactions between them, and the Reſpondent *John* to condeſcend on the Value given for the above Bonds; and the Lord Ordinary was ſo indulgent as to appoint the Repreſentation to be anſwered, and the Anſwers to ſet forth what was the onerous Cauſe of the Bonds granted by *Robert* to *John*.

In anſwer to which, the Reſpondent having produced the Father's Diſpoſition of the Lands of *Lochfield*, of the Tenor above mentioned, and the Liſt of Debts therein referred to, and proffered to ſhow the Petitioner or his Agent the fitted
June 25, 1766, Account of Charge and Diſcharge relative to ſaid two Bonds, the Lord Ordinary, by Deliverance of this Date, appointed the Reſpondent *John* to ſhow the Account of Charge and Diſcharge, and to give a Copy of the ſame upon the Purſuer's Expences, if deſired. And the Reſpondents having accordingly furniſhed the Petitioner's Doer with a Copy of that
July 4, 1766. Account which he produced and lodged in Proceſs, his Lordſhip, by his final Interlocutor of this Date, adhered to the former Interlocutor, and refuſed the Deſire of the Repreſentation, reſerving to the Purſuer, in caſe the Defender, (*Robert*) makes Settlements to his Prejudice, to inſiſt for having them reduced, upon account of his not being of a diſpoſing Mind, when the Succeſſion has by Law opened to him.

The Purſuer has thought proper to complain of theſe Interlocutors, by the Petition now to be anſwered; and, as the Reſpondents are hopeful, in the above Deduction and true State of the Caſe, to have obviated all that is material in the Petition, they ſhall trouble your Lordſhips with very few more Words upon it.

And,

And, 1*ſt*, As to the alledged Inſanity, which would ſeem to be departed from, as the Petitioner has acknowledged a Reconvaleſcence from any Appearance thereof, ſo many Years ago, the Reſpondents are adviſed, and ſubmit it to your Lordſhips, that if the Petitioner means to inſiſt thereon, he muſt follow out the regular Courſe of judicial ofProceedings, preſcribed by Law, for Calamities of that Nature, *viz.* by a Brieve of Furioſity or Idiotry, and a Verdict of an Inqueſt following thereon. It is the Privilege of every Subject of this Country, that they cannot be deprived of their natural Rights, and degraded from the Species of rational Creatures, but by the Verdict of a Jury, finding and cognoſcing them ſuch; and, as the Purſuer ſeems to decline taking this Meaſure, to have the alledged Inſanity cognoſced, your Lordſhips muſt hold the Allegation to be falſe.

Laying the Inſanity out of the Caſe, the Petitioner's Charge reſolves in alledged Facility and Prodigality, without condeſcending upon any one Inſtance, wherein he has ſuffered Advantage to be taken of him, or any one Act of Prodigality or Profuſion, further than what may be ſuppoſed to ariſe from his having granted the aforeſaid two heritable Bonds to his Brother *John*, the Particulars of which have been already ſo well accounted for.

The general Scope of the Action is to have *Robert* judicially interdicted, in order to ſecure to the Petitioner the Succeſſion to this ſmall Eſtate, upon his Brother *Robert*'s Death without Iſſue, and to diſable *Robert* from doing any Deed prejudicial thereto; but the main Object in view is to force the Reſpondent *John* into a Proceſs of Count and Reckoning with him, the Petitioner, and to compel *John* to aſtruct the ſeveral Articles in the Account of Charge and Diſcharge, as already ſettled with *Robert*.

That your Lordſhips, *cauſa cognita*, upon any incidental Evidence of extraordinary Facility and Weakneſs, and of undue-

due Advantages being taken of the facile Perſon, may lay him under an Interdiction, *ad exemplum* of the Remedy provided by the Civil Law, in the Caſe of Prodigals and Spendthrifts, *qui neque finem neque modum expenſarum habent*, the Reſpondent ſhall not diſpute; and, from the eſtabliſhed Stile of the Brieves of Lunacy, they are adviſed that this Remedy may be obtained, where there is Cauſe for it, by the Verdict of an Inqueſt following upon ſuch Brieves, though they do not recollect any Example of a Proceſs of this Kind in the ordinary Courſe of judicial Proceedings.

But in whatever Form or Manner this Cognition is to be taken, as it is the preſent State and Condition of Mind that is to be the Object of Trial, your Lordſhips will never give way to ſo violent a Remedy, without a ſpecial Condeſcendence of ſuch Facts and Circumſtances, as, if proven, would be relevant to infer ſuch a Degree of Facility at the Time, and ſuch a Train of Prodigality and Profuſion, as would be ſufficient to juſtify ſo ſevere a Sentence.

The Purſuer has indeed alledged Acts of Folly and Indiſcretion at certain diſtant Periods, when *Robert* unhappily was addicted to a Habit of drinking. But as nothing of that Kind is alledged to have happened for ſeveral Years paſt, during all which Space he has lived moſt regularly and inoffenſively; ſo the only Acts of Prodigality that have been condeſcended upon, are his granting theſe two heritable Bonds to his Brother *John*, at the Sight of Gentlemen of Character, who witneſſed the ſettling of the Account between the two Brothers, every Article of which, other than the ſmall Advances made from time to time to *Robert* himſelf, can yet be aſtructed, though he will fairly confeſs, that from the Diſpoſition or Mind of this Petitioner, he does not chooſe to involve himſelf in a Count and Reckoning *ab ovo*, which he foreſees

foreſees would involve him in ſuch an expenſive and troubleſome Litigation with this Petitioner.

If *Robert* ſhall do any Deed to the Prejudice of the Petitioner's Right of Succeſſion, the Law will be patent when the Succeſſion opens to him, and the Lord Ordinary's Interlocutor reſerved that Right to challenge as ſhall then accord of the Law, it is only with reſpect to the Succeſſion in the heritable Eſtate, which even then would give the Petitioner any Title to challenge his Brother's Deeds; for, as to the Moveables, was an Interdiction to be awarded, it would not reach theſe, it is at beſt uncertain whether the Petitioner will ever be intitled to challenge theſe Deeds, if any ſuch ſhall ever be granted; but, in the State in which Matters ſtand at preſent, it is humbly thought that the preſent Action muſt appear groundleſs, vexatious and oppreſſive.

In reſpect whereof, &c.

ALEX. LOCKHART.

PETITION